

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 4, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

No. 96-1864

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

MARY VERDEV,

PLAINTIFF-APPELLANT,

v.

**ST. FLORIAN CATHOLIC CHURCH AND
STATE OF WISCONSIN DEPARTMENT OF
HEALTH & SOCIAL SERVICES,**

DEFENDANTS-RESPONDENTS,

**WISCONSIN PHYSICIAN'S SERVICE
INSURANCE CORPORATION,**

DEFENDANT.

APPEAL from a judgment of the circuit court for Milwaukee County: PATRICK J. MADDEN, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Curley, JJ.

PER CURIAM. Mary Verdev appeals from a judgment dismissing her negligence action against St. Florian Catholic Church, Wisconsin Physician's Service Insurance Corporation and the State of Wisconsin Department of Health & Social Services (collectively the "Church"). The trial court dismissed the case as a sanction because Verdev failed to comply with a trial court order. *See* § 804.12(2)(a)3, STATS. Verdev claims the trial court erred when it granted the Church's motion to dismiss. Because the trial court did not erroneously exercise its discretion in granting the dismissal motion, we affirm.¹

I. BACKGROUND

This case arises from injuries Verdev sustained when a bingo board rolled off a stage and fell on her. The accident occurred on June 30, 1990, while she was a guest at a bingo game sponsored by St. Florian Catholic Church. On June 24, 1993, Verdev commenced this lawsuit.

The record documents difficulty in scheduling Verdev's deposition and difficulty with additional discovery. On November 11, 1994, the Church filed a motion requesting an adjournment of the trial on the grounds that Verdev failed to appear for an independent medical exam (IME). The trial court held a hearing on that motion on November 21, 1994. During the motion, the parties stipulated that the IME would be conducted by the second week of December. An order was entered reflecting this, with the additional directive that failure to comply with the order would result in dismissal.

¹ The Church filed a motion pursuant to §§ 809.14 and 809.25(3), STATS., requesting dismissal of the appeal and an award of costs on the basis that Verdev's appeal is frivolous. That motion is denied.

The IME was scheduled for December 6, 1994. Verdev appeared for the IME, accompanied by her daughter. The IME physician told Verdev that her daughter could not be present during the exam. Verdev refused to have the exam performed without her daughter present and left. As a result, the Church filed a motion to dismiss. The trial court heard the motion on January 6, 1995. Following the hearing, the trial court issued an order that Verdev would be allowed to have another individual present during the IME. The IME was scheduled for March 21, 1995, and Verdev was instructed that her failure to attend would result in dismissal of the case. Verdev apparently complied with this order because the record does not contain any further reference regarding this dispute.

On November 15, 1995, the Church filed a motion to compel another IME, this time for a neuropsychological examination. In December 1995, the trial court granted the motion. On January 2, 1996, the trial court entered an order directing Verdev to appear for the psychological exam, but allowing her to be accompanied by another person during the exam. The exam was scheduled for February 23, 1996. Verdev showed up but refused to submit to the exam because her psychiatrist, Dr. Basil Jackson, was unable to attend. On the same day as the exam was to occur, Dr. Jackson sent an *ex parte* communication to the trial court informing it of his inability to attend.

The Church filed a motion to dismiss based on Verdev's failure to comply with the trial court's order directing her to undergo the exam. The trial court heard the motion on April 15, 1996. Verdev testified at the hearing. Dr. Jackson's letter was opened and read at the hearing. The trial court dismissed the case stating:

I find there's no legitimate excuse for the lady not appearing for the required examination. Having failed to

comply with the Court order, not because of this one instance, but because of the history of this case – I won't go into detail, it's all on the record – this case is dismissed.

Judgment was entered. Verdev now appeals.

II. DISCUSSION

The trial court's decision to dismiss this case was a discretionary one and we will not reverse unless it erroneously exercised its discretion. *See Monson v. Madison Family Inst.*, 162 Wis.2d 212, 224, 470 N.W.2d 853, 858 (1991). The trial court has both statutory authority, *see* § 804.12(2)(a)3, STATS., and inherent authority to sanction parties for failure to obey court orders. *See Johnson v. Allis Chalmers Corp.*, 162 Wis.2d 261, 273-74, 470 N.W.2d 859, 863 (1991). We will find that the trial court has erroneously exercised its discretion: “(1) if there is no reasonable basis to support the circuit court's determination that the aggrieved party's conduct was egregious or (2) if the aggrieved party can establish a clear and justifiable excuse.” *Monson*, 162 Wis.2d at 224, 470 N.W.2d at 858. Having reviewed the record, we cannot conclude that the dismissal sanction ordered by the trial court constituted an erroneous exercise of discretion.

The record is rampant with support documenting Verdev's failure to comply with court-ordered deadlines and her repeated failure to comply with procedural statutes or rules. The record shows her initial refusal to comply with the court order regarding the first medical examination, problems with attending her deposition, failure to comply with discovery statutes regarding interrogatories, failure to comply with the deadline for filing permanency reports, and failure to comply with the court's order to undergo the psychological exam. These incidents are a reasonable basis for the trial court's implicit determination that Verdev's

conduct was egregious. *See id.* (Finding of egregiousness may be implicit in the record rather than explicit).

Further, we are unconvinced by Verdev's attempt at establishing a clear and justifiable excuse. Verdev argues that she was justified in not undergoing the psychological exam because her psychiatrist was unable to attend. This is insufficient to satisfy the clear and justifiable excuse standard. The exam was scheduled two months earlier. If Verdev, for personal reasons, absolutely needed her psychiatrist to attend with her, she had sufficient time to arrange that. If Dr. Jackson had a conflict with the date, Verdev should have requested that the exam be rescheduled. She failed to do either. She failed to notify the court or the Church that she needed to reschedule. She did so, despite the protracted history of this case, and despite the repeated warnings by the trial court that failure to comply with its orders would result in dismissal of the case. We conclude that Verdev's reason for failing to comply with the trial court's order was not a clear and justifiable excuse. Rather, it was a personal, unilateral and disrespectful decision to ignore a court order and disrupt the furtherance of the lawsuit.

“The authority to impose sanctions is essential to the circuit court's ability to enforce its orders and ensure prompt disposition of lawsuits.” *Johnson*, 162 at 274, 470 N.W.2d at 864. The trial court in Verdev's case found it necessary to repeatedly threaten dismissal in order to ensure compliance with its orders. This threat was not sufficient to gain compliance with the court order

regarding the psychological exam. Under these circumstances, we cannot say that the trial court's dismissal sanction was an erroneous exercise of discretion.²

By the Court.—Judgment affirmed.

This opinion will not be published. See RULE 809.23(1)(b)5, STATS.

² We are concerned by the implications that the Church's counsel may have intentionally disclosed certain medical records documenting injuries of a personal nature for which Verdev was not seeking compensation. In light of these suggestions, we caution counsel that such practices are not encouraged nor condoned by this court. Our justice system does not permit harassment of either party, plaintiff or defendant.

